LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 24 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963
No. 862

BERNARD REICH and SYLVIA REICH, Depositors and members of BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION, individually and in behalf of BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION and the other depositor-members of said Association, similarly situated,

Petitioners,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB and BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

JACK CORINBLIT,
VAUGHAN, BRANDLIN, ROBINSON & ROEMER,
3424 Wilshire Boulevard,
Los Angeles 5, California,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

Page

Citations to opinions below 1

Jurisdiction 2

Questions presented 6

Statement 7

Reasons for granting the writ 12

I.

The decision of the court below in the instant case decides an important federal question having substantial significance to the administration of the Home Owners Loan Act of 1933, 48 Stat. 132 and to the rights of all depositor-members of federal savings and loan associations 12

A. There are no provisions in the act or the board's regulations governing the prohibition or regulation of the diversion of assets of an association or its members by directors of an association or imposing any liability therefor 13

II.

The decision below is in direct conflict with applicable decisions of this court 18

III.

The decision below is in conflict with a decision of the court of West Virginia and the decision of the Court of Appeals for the Third Circuit .. 27

IV.

Page

The question presented is of substantial importance in the administration of the Home Owners Loan Act of 1933 28

Appendix A. Home Owners' Loan Act of 1933, as amended, 12 U.S.C., Section 1464(d)(1) ..App. p. 1

Appendix B. Opinion of the District Court of Appeal .....App. p. 4

TABLE OF AUTHORITIES CITED

Cases — Page

Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 109 P. 2d 942 28

Agnes K. Head, dba Lea Publishing Co. v: New Mexico Board of Examiners in Optometry; .... U. S. .... 83 S. Ct. 22, 23, 25

Bank of United States v. Deveaux, et al., 5 Cranch 61, 3 L. Ed. 38 26

Beverly Hills Federal Savings & Loan Association v. Federal Home Loan Bank Board (U. S. D. C. S. D. 1962), ... Fed. Supp. 28

Colorado Anti Discrimination Committee, et al. v. Continental Air Lines Inc.; .... U. S. ...., 83 S. Ct. 22, 24, 25

Daurelle v. Traders Federal Savings and Loan Association, 104 S. E. 2d 320 27

Dietrich v. Greaney, 309 U. S. 190 12

D'Oench, Duhme and Co. v. F.D.I.C., 315 U. S. 447 12

Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings and Loan Association, 277 F. 2d 437 ..... 15, 27

Hotch v. United States, 212 F. 2d 280 15

National Bank v. Commonwealth, 76 U. S. 353 14

Schechter Poultry Corp. v. United States, 295 U. S. 495 16

Skinner and Eddy Corp. v. United States, 249 U. S. 557 19

Township of Hillsborough v. Cromwell, 326 U. S. 620 ..... 20, 21

United States Alkali Export Association v. United States, 325 U. S. 196 ..... 19, 20

William L. Greene v. United States, ... U. S. 19, 20, 21, 22

Miscellaneous

House Hearings, Committee on Banking and Currency, 83rd Congress, 2d Session, pp. 204, 205 16

Senate Hearings, Committee on Banking and Currency, 83rd Congress, 2d Session, pp. 83, 84 16

Statutes

Code of Federal Regulations, Title 12, Chap. V, subchap. C, Secs. 541-555 14

Code of Federal Regulations, Title 12, Chap. V, subchap. C, Sec. 542.2 18

Code of Federal Regulations, Title 12, Chap. V, subchap. C, Sec. 542.3 17

Code of Federal Regulations, Title 12, Chap. V, subchap. C, Sec. 544.1 (a), par. 3..... 26

Code of Federal Regulations, Tit' 12, Chap V, subchap. C, Sec. 544.1 (b), par. 3 26

40 Statutes at Large, p. 516..... 19

48 Statutes at Large, p. 132 13

United States Code, Title 5, Sec. 1002(a)(3) 14

United States Code Annotated, Title 12, Sec. 1461 .. 13

United States Code, Title 12, Sec. 1464 3

United States Code Annotated, Title 12, Sec. 1464-(a) 13, 15

United States Code, Title 15, Sec. 61 19

United States Code, Title 15, Sec. 62 19

United States Code, Title 15, Sec. 65 20

United States Code, Title 15, Sec. 1464(d)(1) ..... 6, 13, 15, 16, 17.

United States Code, Title 15, Sec. 1464(d)(2) ..... 6, 21, 22.

United States Code, Title 28, Sec. 1257(3) 2, 5

Textbooks

Page

Prather, Applicability of State Law and Federal Law to Federal Financial Institutions, U. S. Savings and Loan League, Legal Bulletin, 1954, p. 55 14

3 Davis, Administrative Law Treatise (1958), Sec. 20.07 21

IN THE

Supreme Court of the United States

October Term, 1963

No. .....

BERNARD REICH and SYLVIA REICH, Depositors and members of BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION, individually and in behalf of BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION and the other depositor-members of said Association, similarly situated,

Petitioners,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB and BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Petitioners pray that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, entered in the above-entitled case on August 5, 1963.

Citations to Opinions Below.

The minute order of the trial court, the Superior Court for Los Angeles County, State of California [C. T. 37] is unreported. The opinion of the District Court of Appeal for the State of California, Sec-

ond Appellate District, printed in Appendix B hereto, *infra*, pages 4-13; is reported in 218 Advance California Appellate Reports 910.

Jurisdiction.

The order and judgment of the District Court of Appeal were entered on August 5, 1963 (Appendix B, page 4). A petition for hearing with respect thereto in the Supreme Court of California was denied on October 1, 1963 [R. 1] Petitioners' time within which to file the instant petition was extended by order of this Court on February 3, 1964, to February 25, 1964. The jurisdiction of this court is invoked under 28 U. S. C. §1257-(3).

The central issue in this action relates to the dismissal of petitioners' claims, as depositor-members of a Federal Savings & Loan Association, against former directors of that Federal Savings & Loan Association for breach of fiduciary duty.

Petitioners asserted in their complaint that these former directors had sold proxies which they held from members of the Savings and Loan Association and had sold their directorships for $1,500,000.00, and that this act constituted a breach of fiduciary duty and petitioners, by way of a derivative action, were entitled to recover these moneys and any damages suffered on behalf of the association since the association itself refused petitioners' demand that it seek recovery against former directors. The relif sought by petitioners was the imposition of a constructive trust on the moneys received by the former directors and the recovery of actual and punitive damages. The former directors, the Webb respondents, and the association demurred

to petitioners' complaint. The sole grounds upon which the demurrer was sustained, without leave to amend, was that under a Federal statute, the Home Owners Loan Act of 1933 (12 U. S. C. Section 1464 *et seq.*) that former directors were immune from suit until petitioners had exhausted a remedy asserted to be available to them before the Federal Home Loan Bank Board under that statute [C. T. 37].

The trial court and the District Court of Appeal each based their decision dismissing petitioners' complaint upon a construction of this Federal statute, *i.e.*, the Home Owners Loan Act of 1933 as amended (hereinafter the Act), holding in substance, that in this action it created an immunity for the benefit of respondents. The trial court held "exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts in any matter relating to the operation and regulation of any Federal Savings and Loan Association. The authority (as well as the responsibility) for such regulation lies with the Home Loan Bank Board" [C. T. 37].

The District Court of Appeal affirmed the dismissal of petitioners' complaint upon the same grounds. The Court stated: "Since the rules and regulations of the Home Loan Bank Board contain detailed provisions regarding the Government of such internal affairs, the plaintiffs are thereby afforded administrative remedies. It does not appear from the amended complaint that plaintiffs have exhausted such remedies. There is nothing in the record to indicate that they could have amended to include such an allegation. The court did not err in sustaining the demurrers without leave to amend. The judgment is affirmed" (App. B, p. 13).

Petitioners filed a petition for hearing in the Supreme Court of California which raised precisely the same points. Thus, as their points I and II respectively, petitioners asserted:

"I.

The Federal Home Owners Loan Act of 1933 does not regulate and the board has not adopted or promulgated any regulation which prohibits directors or officers of a Federal Savings and Loan Association from diverting the assets of the association, or its members, to their own private benefit, or covering generally the subject of breach of fiduciary duty. The board has not provided for a hearing for any party claiming to be aggrieved or injured by such acts . . . (Petition for Hearing, p. 8)

"A. Each of the three separate causes of action allege a separate breach of fiduciary duty and misappropriation and diversion of assets . . . (Petition for Hearing, p. 8).

"B. There are no provisions in the act or the board regulations covering the prohibition or regulation of the diversion of assets of an association, or its members by directors of an association, or imposing any liability therefor . . . (Petition for Hearing, p. 11).

"C. The Court failed to designate any provision of the act or the board's regulations which would relate to any of petitioners' three causes of action . . . (Petition for Hearing, p. 14).

"D. The specific hearing provision of the regulations and the act completely negative any requirement for an administrative hearing prior to judicial action in the instant case . . . (Petition for Hearing, p. 22).

II.

"A litigant is not obligated to seek administrative relief from the board if a fair construction of the board's rules and its governing statute reveals that the particular subject matter of the complaint is not arguably encompassed by the regulations or the statute. The decision below is in conflict with decisions of at least one other California Appellate decision and with governing federal law on this basic proposition of law . . . (Petition for Hearing, p. 28)

"B. Governing federal decisions and federal policy preclude the holding that petitioners have an administrative remedy before the Federal Home Loan Bank Board or that a proceeding before that board is a condition for asserting petitioners' right that fiduciaries of a federal savings and loan association be held accountable for their violation of fiduciary duty . . . (Petition for Hearing, p. 32)"

The petition for hearing in the Supreme Court of the State of California was denied [R. 1].

It is clear from the foregoing that the substantial issue below, indeed the only issue, was the decision by the California courts construing a Federal statute, *i.e.*, the Act, in such a manner as to create an immunity as respects former directors of a Federal Savings & Loan Association against petitioners' derivative action upon the grounds that this Act provides an adequate and available administrative remedy which petitioners were required to exhaust prior to suit. This Court, therefore, has jurisdiction of this petition, under 28 U. S. C. Sec. 1257(3).

Questions Presented.

1. Does an administrative proceeding before the Federal Home Loan Bank Board under 15 U. S. C. §1464 (d)(1) constitute an appropriate federal administrative remedy as respects a claim by depositor-owners of a Federal Savings and Loan Association that former directors sold depositors' proxies and the association directorships for money for their private benefit, and seeking a money judgment for the association and its members for that breach of fiduciary duty, where it is established by the Act and the regulations that (1) the board has not adopted any regulations as to the claimed fiduciary duties of directors to the association and its members and therefore has no jurisdiction over the subject matter of petitioners' claim; (2) that the board is restricted by statute to actions against the association only and cannot sue former directors and therefore has no jurisdiction over the parties against whom petitioners seek relief, and (3) *a fortiori*, the board has no power under this section to recover from former directors of an association a money judgment for the benefit of the association or its depositor-owners.

2. Does the power of the Federal Home Loan Bank Board to appoint a conservator or receiver for an association upon the specific grounds enumerated in 15 U. S. C. §1464(d)(2) constitute an appropriate administrative remedy, thus barring petitioners' derivative claim now which asserts that former directors sold proxies and directorships for their private gain, where the derivative claim by the depositor-owners is based solely upon past acts only, by former directors in their individual capacity, for *ultra vires* acts only, and no claim whatsoever is made against the association itself

and where the appointment of a conservator or receiver for the association is irrelevant to petitioners' claim and is neither the requested nor the desirable relief sought by petitioners.

Statement.

When a group of individuals hereinafter referred to as the Lytton group obtained control of Beverly Hills Federal Savings and Loan Association, hereinafter referred to as the Association, a mutual Federal Savings and Loan Association, it was discovered that respondents Eugene Webb, Jr. and his wife, Marguerite Webb, two dominant officers and directors of the Group who then controlled Beverly Hills Federal had personally profited in the amount of $1,500,000.00 in connection with the transfer of proxies, directorships and control to the Lytton group. It was further discovered that $15,000,000.00 in loans were immediately and improperly purchased from the Lytton group by the Association after the Lytton group obtained control. When Appellants Bernard Reich and Sylvia Reich, husband and wife who were depositor members of the Association, made demand upon the directors of the Association that the Association file suit against the Webbs and their group to recover the $1,500,000.00 as an asset of Beverly Hills Federal which had been fraudulently diverted by the Webbs through their breach of fiduciary duty and to recover the $15,000,000.00 improperly paid for loans by the Association and to recover for diversion of other Association assets as well as damages suffered by the Association at the hands of the Lytton group, the Directors of the Association declined to act.

Petitioners' first amended complaint was captioned "First Amended Complaint for Declaration of a Con-

structive Trust, Accounting, General Damages, and Punitive Damages." The complaint sets forth three causes of action.

1. A cause of action asserting that respondents Eugene Webb, Jr. and Marguerite R. Webb and certain fictitiously named defendants, as officers and directors of Beverly Hills Federal Savings & Loan Association, breached their fiduciary duties to the Beverly Hills Federal Savings & Loan Association and to the members of Beverly Hills Federal Savings & Loan Association by diverting to defendant Southland Mortgage Corporation and to themselves corporate opportunities and expectancies which were the property of Beverly Hills Federal Savings & Loan Association [C. T. 20-24].

2. A cause of action asserting that respondents Eugene Webb, Jr. and Marguerite R. Webb, and certain fictitiously named defendants as officers and directors of the Beverly Hills Federal Savings & Loan Association and as holders of voting proxies from members of said association, had breached their fiduciary duties to the Beverly Hills Federal Savings and Loan Association and to the members of said Association by selling their offices as directors and selling their voting proxies which they had from members of Beverly Hills Federal for the sum of $1,500,000.00, said sale constituting a sale of control of Beverly Hills Savings & Loan Association [C. T. 25-27].

3. A cause of action asserting that defendant Bart Lytton as an officer and director of Beverly Hills Federal Savings & Loan Association, had breached his fiduciary duty to Beverly Hills Federal Savings & Loan Association and to the members thereof, acting in con-

cert with the defendant Lytton Financial Corporation and Lytton Savings and Loan Association, by causing Beverly Hills Federal Savings and Loan Association to purchase certain notes and deeds of trust approximating $15,000,000.00 in face amount and receiving profits, fees and other monetary consideration resulting in damage to Beverly Hills Federal Savings and Loan Association and to the members thereof [C. T. 27-29].

As respects each of these three causes of action it was alleged that petitioners Bernard Reich and Sylvia Reich sued (1) individually and as depositors and members of Beverly Hills Federal Savings and Loan Association and in behalf of the other members of said association similarly situated and (2) in behalf of Beverly Hills Federal Savings and Loan Association [C. T. 20, 22].

Insofar as the causes of action asserted were "derivative" causes of action in nature, it was alleged that prior to suit a demand had been made upon the present Board of Directors of Beverly Hills Federal Savings and Loan Association to assert these claims against the defendants herein and that the demand had been refused [C. T. 24, 26, 28].

The relief sought was:

(1) A judgment that respondents Eugene Webb, Jr. and Marguerite R. Webb held in constructive trust for the use and benefit of Beverly Hills Federal Savings and Loan the sum of $1,500,000.00.

(2) A judgment that all of the assets, profits, net worth and capital stock of Southland Mortgage Corporation were the property of Beverly Hills Federal and that defendant Lytton Finance Corporation and

Bart Lytton hold said property, assets, proceeds, net worth and capital stock in constructive trust for respondent Beverly Hills Federal.

(3) A judgment that defendants Lytton Finance Corporation, Lytton Savings and Loan and Bart Lytton hold in constructive trust for the use and benefit of Beverly Hills Federal all of the notes, deeds of trust and other assets transferred by Beverly Hills Federal after said defendants obtained control of Beverly Hills Federal.

(4) That the respondents Webb account to Beverly Hills Federal for all proceeds, benefits and advantages obtained by them as alleged.

(5) For general damages in favor of Beverly Hills Federal in the sum of $1,500,000.00 and punitive damages in the sum of $500,000.00.

(6) For plaintiffs' costs and expenses, including reasonable attorneys fees.

(7) For general relief [C. T. 29].

A demurrer to each cause of action in Petitioners' First Amended Complaint was filed by the Respondents Eugene Webb, Jr. and Marguerite R. Webb and Respondent Beverly Hills Federal Savings and Loan Association. The demurrer was sustained without leave to amend upon the grounds that "exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts in any matter relating to the operation and regulation of any federal savings and loan

association. The authorities (as well as the responsibility) for such regulation lies with the Home Loan Bank Board" [C. T. 37]. The complaint was dismissed without leave to amend as against all defendants [C. T. 38]. Petitioners appeal as respects the Webb respondents and respondent Beverly Hills Federal Savings and Loan Association was denied by the District Court of Appeal of the State of California, Second Appellate District upon the same grounds (Appendix B, p. 13). The Supreme Court of California denied a hearing [R. 1].

The court's opinion below held squarely that because of the broad powers of the Federal Home Loan Bank Board to prescribe rules and regulations for the organization, incorporation, examination, operation and regulation of federal savings and loan associations and because the rules and regulations of the Board contain detailed provisions regarding the government of internal affairs of the respondent association that thereby petitioners had an available and adequate administrative remedy which they were obliged to exhaust first before resorting to the state courts of California to protect their economic interests in a federal association.

REASONS FOR GRANTING THE WRIT.

I.

The Decision of the Court Below in the Instant Case Decides an Important Federal Question Having Substantial Significance to the Administration of the Home Owners Loan Act of 1933, 48 Stat. 132 and to the Rights of All Depositor-Members of Federal Savings and Loan Associations.

The essence of petitioners' second cause of action, the critical cause of action in the complaint, is that faithless fiduciaries have profited by the sale of rights which, in a mutual association, belong to the depositor-members. Since the present officers and directors who paid the money and bought the proxies and directorships, not unexpectedly, have refused to sue, the depositor-owners of the association can only preserve their rights through the traditional derivative action by suit in either the state or federal court under the general law. Whether the right to sue derivatively by members of a federal savings and loan association arises under the state law or arises from the inter-play of federal statutes (see *Dietrich v. Greaney*, 309 U. S. 190, 200-201 (1940) and *D'Oench, Duhme and Co. v. F.D.I.C.*, 315 U. S. 447, 469-470 (1942)), the *exercise* of that right of self preservation, in an economic sense, is completely frustrated now by a rule of law in the instant case that depositor-owners of an association must first sue in Washington.

The erroneous nature of this rule is dramatically demonstrated by the fact that the agency to which the court below has directed petitioners, as a pre-condition of suit, has no power to adjudicate the substance of petitioners' claim, or to obtain any relief against the

parties sued by petitioners. In short, the purported administrative remedy upon which the court below dismissed petitioners' claim is non-existent.

This is true for the following reasons:

1. The board has not adopted any regulation covering the claimed breach of fiduciary liability by directors to their association either generally or specifically and it has not been given the statutory power under its hearing procedures to commence administrative proceedings against former directors of an association.

2. *A fortiori,* the board cannot give the petitioners the only relief they want, *i.e.,* a judgment for all the financial benefits which the faithless fiduciaries have acquired through their breach of trust and the damages, actual or punitive, to which the association is entitled.

A. There Are No Provisions in the Act or the Board's Regulations Governing the Prohibition or Regulation of the Diversion of Assets of an Association or Its Members by Directors of an Association or Imposing Any Liability Therefor.

The Home Owners Loan Act of 1933, 48 Stat. 132, 12 U. S. C. A. Sec. 1461 *et seq.* provides that:

> "The board is authorized, *under such rules and regulations as it may prescribe* to provide for the organization, incorporation, examination, operation and regulation of associations to be known as 'federal savings & loan associations'." (12 U. S. C. A. § 1464(a) (emphasis added).

The statute further provides that

> "The board shall have the power to enforce this section and rules and regulations made hereunder". (12 U. S. C. A. § 1464(d)(1).)

Nothing in the remaining provisions of the Act itself expressly or by implication covers or regulates the fiduciary duties of directors to the association.

Turning to the regulations, which appear in the Code of Federal Regulations, Title 12, Chapter V, Subchapter C, §§ 541-555, it is immediately evident that they contain no regulations whatsoever covering, expressly or by implication, the breach of fiduciary duty by a director who sells control of the association by sale of proxies and directorships for his own private benefit. Respondents have never contended that such provisions appeared in the regulations and the court's opinion below, except by reference to statements that the board has exercised "broad powers of regulation" does not cite a single provision of the Act or regulations on this subject.

It is not surprising that there are no provisions of the Act or the regulations which cover such breaches of fiduciary duty by a director to an association, since under the Act, as under the federal statutes creating national banks, there are vast areas of duties and rights which are left to enforcement in the state courts under general law. *National Bank v. Commonwealth*, 76 U. S. 353. Prather, Applicability of State Law and Federal Law to Federal Financial Institutions, U. S. Savings and Loan League, Legal Bulletin, 1954, 55.

In 30 years of enforcement of the act the board had never sued a director for breach of fiduciary duty and had never commenced an administrative proceeding against a director for breach of fiduciary duty.

Moreover, the Administrative Procedure Act, 5 U. S. C. § 1002(a)(3) provides that: "Every agency shall state and currently publish in the Federal Register

substantive rules adopted as authorized by law." All of the board's hearings are subject to the Administrative Procedure Act (12 U. S. C. A. § 1464(d)(1)). Unpublished rules or regulations are void and unenforceable. *Hotch v. United States* (C. A. 9, 1954), 212 F. 2d 280; *cf. Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings and Loan Association* (C. A. 3, 1960), 277 F. 2d 437. Thus, since the board has never adopted regulations covering the fiduciary duties at issue here and without adoption and publication such regulations would be void, the board lacks jurisdiction over the substantive liability asserted by petitioners against the respondents Webb.[1]

---

[1] 12 U. S. C. A. Section 1464(d)(1) commences with the following language:

> "The Board shall have power to enforce this Section and rules and regulations made hereunder. In the enforcement of any provision of this Section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in Section (d)(1) hereof, the Board is authorized to act in its own name and through its attorneys".

It cannot be rationally argued that this reference that the Board may sue in its own name and through its own attorneys in the enforcement

> "of any provisions of this Section or rules and regulations made hereunder, or any other law or regulation"

is, without more, a grant of power to the Board to enforce, literally, any other law or regulation. Had this been the intent of the language the words would have been added at the end of the first sentence and not in the middle of the second one. Moreover, this provision is clearly subordinate to 12 U. S. C. A. 1464(a) which provides that the Board is authorized

> "under such rules and regulations as it may prescribe to provide for the organization, incorporation, examination, operation and regulation of associations . . ."

To comply with the Administrative Procedure Act the Board is required to publish the regulations which it intends to enforce. Any inference that the Board has been given carte blanche power to enforce without notice all of the police regulations of the 50 states and the United States is contrary to the basic constitutional principles prohibiting such delegation of power without

Under the Act and the board's regulations, it is clear that the board has power to proceed, in any event, *only* against associations in their corporate capacity. The Board has *no power to sue former directors of an association in their individual capacity.*

The relevant provisions of the Act on this point are set forth at 12 U. S. C. A. 1464(d)(1). At every relevant point jurisdiction is given over the *association* in its corporate capacity only. Thus the hearing procedures are described as follows:

1. The adoption of a formal resolution stating an alleged violation of law or regulation with notice going to the *association.*

---

standards. (*Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

Any suggestion that the adoption of 12 U. S. C. 1464(d)(1) was intended to lessen rather than to tighten the standards for administrative action by the Board is completely destroyed by the legislative history of the adoption of that section. Thus that legislative history shows:

1. That prior thereto the Board's only means of regulation was the appointment of a receiver.

2. In the famous *Long Beach Federal Savings and Loan Association* case the Board appointed a receiver, without notice, for a solvent institution and was thereafter subject to great criticism by members of Congress.

3. New standards were proposed for the appointment of conservators and receivers and their appointment was made subject to review under the Administrative Procedure Act.

4. The Board was given power to enforce its rules and regulations by administrative proceedings also subject to the Administrative Procedure Act.

5. The "industry" reviewed and accepted the proposed statute, a result hardly likely if the language adopted was intended to permit the Board carte blanche, without publishing notice, as to the rules and regulations which it could enforce. (See Senate Hearings, Committee on Banking and Currency, 83rd Congress, 2d Session, pages 83, 84. Also see, House Hearings, Committee on Banking and Currency, 83rd Congress, 2d Session, pages 204, 205.)

2. The *association* is given 30 days to correct the violation of law or regulation and to perform any legal duty.

3. If the association does not comply the Board sends the *association* 20 days written notice of the charges and a time and place for hearing.

4. The place of the hearing is the federal judicial district of the *association* unless it consents to another place. Appeals lie as provided by the Administrative Procedure Act.

5. Either the Board or the *association* have the option, after notice of the alleged violation, to apply to a United States District Court for the district where the association is located for a declaratory judgment, an injunction or other relief.

6. The Board may apply to the district court of the district where the *association* affected has its home office for the enforcement of any Board order.

7. The Board is made subject to suit by any *association.*

Thus the statute is clear that hearing procedures are between the Board and association only.

If this were not sufficient the Board's regulations concerning hearings relating to compliance with "law and regulations" adopted the same mechanics, *i.e.*, a hearing between the Board and the association only. Thus Section 542.3 of the regulations (12 C. F. R. Chapter V, sub-chapter C, Section 542.3) repeats the basic provision of 12 U. S. C. A. Section 1464(d)(1) and in every case the procedure is between the Board and the association only. There is even added a provision with respect to costs, "the cost of any hearing pur-

suant to the provisions hereof, as determined by the Board, may be assessed against the federal association party to such hearing unless it is found that such federal association was not guilty of the alleged violation of laws, regulations or duty."[2]

From the foregoing it appears to be clearly established that in the instant case the Board has no jurisdiction, in the classical sense, as respects the substantive allegations of the petitioners' complaint or as respects the parties from whom petitioners seek relief. This fact appears from the very face of the Act and the regulations.

But if the Board has no jurisdiction in this classical sense petitioners were entitled to proceed with their suit without diversion into the blind alley of a void and unwarranted administrative proceeding.

II.

The Decision Below Is in Direct Conflict With Applicable Decisions of This Court.

This court has long held that where claimed alternative administrative proceedings are inappropriate or inadequate, such proceedings need not be exhausted prior resort to the courts. The decision this term in *William*

---

[2]Section 542.2 of the regulations (12 C. F. R. Chapter V, sub-chapter C, Section 542.2) permits application for hearing by any person "who has made an application or petition to the Board pursuant to any provision of parts 543, 544, 545 or 546 of this sub-chapter." Those sub-chapters are each admittedly irrelevant to any of the claims in this action. This section also provides that, "the Board may order a hearing in connection with the consideration of any matters arising under any provision of the rules and regulations of this sub-chapter, whether or not any request therefor has been made by any person." Since, as noted above, the Board has not adopted any regulations covering the claims in this action expressly or by implication, this provision is irrelevant.

L. Greene v. United States, ... U. S. ..... (1964) is directly in point. In *Greene supra*, a defense employee who had been wrongfully discharged under security clearance procedures which this court held constitutionally unauthorized, sued for recovery of back wages under a 1955 administrative rule. The court of claims held that petitioner was barred for failure to exhaust administrative remedies under an administrative procedure and rule which had been newly adopted in 1960. This court held that the new rule did not provide a reasonable basis for reviewing petitioners' rights under the prior rule. Therefore, the court said, "since in this case the only available administrative procedure entitled the burden of presenting the claim under an inapplicable and substantially revised regulation, that procedure must be regarded as inappropriate and inadequate and therefore need not be pursued." *William L. Greene v. United States*, ... U. S. ..... at p. ..... (1964).

The *Greene* case, *supra*, was preceded by at least four other decisions of this court applying the same principal. Thus, in *Skinner and Eddy Corp. v. United States*, 249 U. S. 557, 562-563; it was held that courts have the power to proceed without the initiation of an administrative proceeding where the agency has exceeded its statutory powers so that its determination would be void.

In *United States Alkali Export Association v. United States*, 325 U. S. 196 (1945) it was argued that as respects an action under the antitrust laws by the United States, that an administrative hearing before the Federal Trade Commission was required under the Webb-Pomerene Act (40 Stat. 516, 15 U. S. C. Secs. 61, 62,

65). This court denied this contention. The Court said:

> "The only function of the Federal Trade Commission * * * is to investigate, recommend and report. It can give no remedies. It can make no controlling finding of law or fact. Its recommendation need not be followed."

In *Township of Hillsborough v. Cromwell*, 326 U. S. 620, 625-626 (1946), the exhaustion requirement was dispensed with because of inadequacy of the remedy where an analysis of the remedy showed that, "There is such an uncertainty" as respects the remedy as "to make it speculative."

In the instant case, the supposed administrative remedy before the Board is inadequate and inapplicable within the standards laid down in each of the foregoing decisions. Thus, as we have noted above, by reason of the board's failure to adopt any regulations concerning the substantive subject matter of petitioners' claim and by reason of the board's statutory restriction to proceedings against the association only, it has no power in the premises. It can make no controlling finding of law or fact. Any recommendation it might make need not be followed. *United States Alkali Export Association v. United States, supra.*

For the same reason, the existing regulations of the board are "inapplicable" to petitioners' claim, see *William L. Greene v. United States, supra.* Certainly the least that can be said in this case is that there is "such uncertainty concerning the remedy before the board to

make it speculative." *Township of Hillsborough v. Cromwell, supra.*

> "Impossibility or improbability of obtaining adequate relief by pursuing administrative remedies is often a reason for dispensing with the exhaustion requirement." *3 Davis, Administrative Law Treatise* (1958), § 20.07, cited with approval by the court in *William L. Greene v. United States,* ..... U. S. ..... (1964).

Certainly it cannot be argued in this case that the power of the board to appoint a conservator or receiver over the affairs of the association under 14 U. S. C. 1264 (d) (2) is an adequate or applicable administrative remedy. This is not the relief which petitioners seek. In fact, it would be the most destructive remedy which could be imagined. Appointment of a receiver over a solvent financial institution, with the likelihood of "runs" on deposits, etc., in order to obtain money relief from faithless fiduciaries would be a kind of administrative "over-kill" which would be unconscionable and self-destructive of the rights of the very depositors whom petitioners represent.

Greene v. United States, supra, clearly establishes that petitioners are not required to make a choice between the protection of their economic rights and proceedings under irrelevant regulations.

In *Greene v. United States, supra,* the petitioners sought only money damages, not reinstatement to current, authorized status with the Defense Department. The court held that administrative review under a new regulation which set out standards for current authorized status, not requested by petitioner, was irrelevant, and that therefore such review was not required to be ex-

hausted prior to judicial action. Similarly in the instant case petitioner seeks money damages and the imposition of a constructive trust for breach of fiduciary duty by former directors of an association. The relief is sought for *past* acts and for actions which were *ultra vires* as to the association. The substantive standards for the appointment of a conservator or a receiver, as set forth in 12 U. S. C. Section 1464 (d)(2) are standards which have to do with current activities by the association which justify the most drastic remedy. Just as in *Greene v. United States, supra*, those standards are irrelevant to petitioners' suit for a money judgment. Therefore, just as in *Greene v. United States, supra*, petitioners are not required to seek appointment of a receiver or conservator before proceeding with their litigation in the state court under general law.

The decision below is also contrary to and in conflict with this court's decisions in *Agnes K. Head, dba Tea Publishing Co. v. New Mexico Board of Examiners in Optometry*, ... U. S. ..... 83 S. Ct. ..... (1963) and *Colorado Anti Discrimination Committee, et al. v. Continental Airlines, Inc.*, ... U. S. ....., 83 S. Ct. ..... (1963). It is clear that the holding of the court below that petitioners were required to exhaust purported remedies before the board was based upon the proposition that "since the rules and regulations of the Home Loan Bank Board contain detailed provisions regarding the government of such internal affairs, the plaintiffs are thereby afforded administrative remedies" which they are required to exhaust. The court below clearly held it was unnecessary to determine whether the *specific* claims against the *specific* parties sued by petitioners were the subject of regulation by the Federal

Home Loan Bank Board. The court held that the *general power of regulation* which had been generally exercised by the board deprived the California court of jurisdiction to grant petitioners' relief.[3] In *Agnes K. Head, dba Lea County Publishing Co. v. New Mexico Board of Examiners in Optometry*, ... U. S. ....., 83 S. Ct. ..... (1963), the issue was whether a state's regulation of radio advertising "by any means" was precluded or preempted by the licensing power of the Federal Communications Commission. In analyzing the issue this court noted expressly:

> "In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the 'comprehensive' nature of Federal regulation under the Federal Communications Act. The question whether Congress and its commissions acting under it have so far exercised the

---

[3]The significance of this purported rule of law to the court below is seen by its emphasis on such statements, taken from other California decisions, that

> "the board has provided extensively detailed rules for the government of each and every act of the internal affairs of associations and under the law fully adequate powers are granted to the board for the enforcement of its orders, including even the right to take over exclusive judgment of the association for failure or refusal to obey the board's orders."

From another case the court quoted:

> "The rules and regulations of the board are comprehensive, explicit, and govern the operation of Federal savings and loan associations from their inception to their dissolution. They have the force and effect of law and are binding upon an association, its board of directors and its members."

exclusive jurisdiction that belonged to it as to exclude the state, must be answered by a judgment upon the particular case. Statements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: Whether Congress intended to make its jurisdiction exclusive. *California v. Zook*, 336 U. S. 725, 731. *Kelly v. Washington*, 302 U. S. 1, 10-13. In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that State statutes, otherwise valid, must be upheld unless there is found such actual conflict between the two schemes of regulation that both cannot stand in the same area (or) evidence of a congressional design to preempt the field. *Florida Avocado Growers v. Paul*, 373 U. S. 132."

In *Colorado Anti-Discrimination Commission, et al. v. Continental Airlines, Inc.*, ... U. S. ..... 83 S. Ct. ..... (1963) it was contended that Colorado's anti-discrimination law was preempted by reason of "broad authority" granted to the Civil Aeronautics Board, which authority had indeed been exercised by extensive regulation. This court nevertheless held Colorado's statute enforceable. Thus the court said

"notwithstanding this broad authority, we are satisfied that Congress in the Civil Aeronautics Act, and its successor, had no express or implied intent to bar state legislation in this field, and that the Colorado statute, at least so long as any power of the Civil Aeronautics Board may have remained 'dormant and unexercised' will not frustrate any part of the purpose of the Federal legislation."

The *Head* case, *supra*, and the *Colorado Anti-Discrimination* case, *supra*, both concern agencies with the power of economic life and death, *i.e.*, the power to give or refuse a franchise. This is true of the board as well. The *Head* and *Colorado Anti-Discrimination* cases involve statutes which confer upon the respective agencies "board general powers" and the agencies have exercised this power by establishing "extensive detailed regulations". This is also true of the Federal Home Loan Bank Board. But in these decisions of this court it is established that rights or duties under state law, in the face of these federal powers, must be determined upon the basis of the particular facts as to the particular right or claim and its relationship to the purposes of Congress in enacting the regulatory scheme involved.

This standard was rejected by the court below and its decision is squarely contrary to the foregoing decisions by this court.

If the principles of the *Head* and *Colorado Anti-Discrimination* cases, *supra*, had been applied, a contrary result would have been required.

Thus it cannot be argue that the enforcement by California of fiduciary duties of directors of a federal savings and loan association is in conflict with the Home Owners Loan Act or denies any rights granted by that act or that such enforcement would stand as an obstacle to the full effectiveness of the Federal statute. On the contrary, these are financial institutions and the imposition of strict fiduciary requirements is not only in accordance with Congressional policy, but is certainly expected by every depositor in either a bank or a savings and loan association. There is not a shred of evidence that the Congressional enactment of the

Home Owners Loan Act was intended to oust the right of California courts to give protection to California depositors in Federal savings and loan associations against faithless fiduciaries.

It should be noted that the charter forms for Federal savings and loan associations have always included as one of the objects and powers, the power "to sue and be sued, complain and defend in any court of law or equity". (12 C.F.R. chapter V, sub-chapter C, § 544.1 (a), paragraph 3, and § 544.1 (b), paragraph 3.

Since the decision of this court in *Bank of United States v. Deveaux, et al.*, 5 Cranch 61, 3 L. Ed. 38 (1809), it has been established doctrine that the presence of that provision in a charter of a corporation organized by an agency of the United States did *not* give the chartered corporation the right to sue in the Federal courts. Thus, it has been the expected result that the state courts would be the forum in which Federally created corporations, including national banks and Federal savings and loan associations, would litigate their day-to-day claims and protect their property rights. That protection has never been deemed to be inconsistent with the Congressional plan of regulation of these financial institutions. Had the court below applied this rule of law, it would have found petitioners' claim consistent with the Federal regulatory scheme.

The holding below in the instant case is therefore clearly contrary to the applicable decisions of this court.

III.

The Decision Below Is in Conflict With a Decision of the Court of West Virginia and the Decision of the Court of Appeals for the Third Circuit.

In *Daurelle v. Traders Federal Savings and Loan Association* (W. Va. 1958), 104 S. E. 2d 320, the court held, despite the existence of all of the board regulations, that judicial action by way of mandamus to force an association to permit a member to see the membership list for the purpose of soliciting proxies was not barred by any requirement for the exhaustion of administrative remedy, since there was no available administrative remedy as respects that claim.

In *Federal Home Loan Bank Board v. Greater Delaware Valley Savings and Loan Association* (C. A. 3 1960), 277 F. 2d 437, the court held, despite the existence of the same extensive board regulations, that a Federal association had the right to convert to a state association under state law without board approval and even during the pendency of charges of mismanagement by the board against the association. Since the board had not regulated that subject matter, the exercise of a state right could not be blocked.

These decisions are squarely in conflict with the decision below, since, as noted above, the District Court of Appeal has held that the presence and the exercise of broad powers of regulation by the board automatically bars the exercise of the rights of an association under general law without prior administrative proceedings before the board.[4]

---

[4]In a case in which many of the claims made here are asserted, the Board has for the first time in thirty (30) years taken the position that it has jurisdiction to file suit by way of a cross-

IV.

The Question Presented Is of Substantial Importance in the Administration of the Home Owners Loan Act of 1933.

As the result of the adoption of the Act in 1933, millions of depositor-members have placed their funds in Federal savings and loan associations. California is recognized as one of the leading states in the savings and loan association field. The decision below imposes a serious impediment upon the right of depositors in those associations to protective relief against faithless fiduciaries where the present management declines to act.

The rule of law asserted below would be unconscionable if applied in practice. Under California law, the failure to exhaust administrative remedies is "jurisdictional", *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 292, 109 P. 2d 942 (1941). Since the association and its members must have the right to prompt protection by the courts against fiduciaries who remove assets, embezzle funds, take property or jeopardize the existence of the association, the requirement for proceedings in Washington would be hopelessly frustrating to the prompt and vigorous protection of those rights.

Such a rule hopelessly and unreasonably gives greater protection to a guilty former director who has obtained illegal cooperation from present officers than it would

---

claim agains faithless fiduciary directors and officers to recover and to impose a money judgment against them. Petitioners' Motion to Intervene in that action was denied and is now pending in the Court of Appeals for the Ninth Circuit. *Beverly Hills Federal Savings & Loan Association v. Federal Home Loan Bank Board* (C. S. D. C. S. D. 1962), ... Fed. Supp. ..... The case number is 18457.

to the same guilty director as to whom present management was adverse. In the latter case it is conceded that the association's direct suit would be permissible without restriction. Only if the association cooperated with the wrongdoer and refused to sue, thus requiring depositor-members to initiate a derivative action, do the wrongdoers obtain the benefit of delay and expense arising from a rule requiring an administrative proceeding in Washington.

The logic of the rule applied by the court below seems perverse. If an association may exercise directly the right to sue former directors for breach of fiduciary duty without any requirement for prior administrative action, how can it be argued that the exercise by the depositor-members of that association of the same right to sue, derivatively, permits the imposition of such an impediment? The fact is that to protect the rights of depositor-members of a Federal savings and loan association in cases where present management declines to act, the courts, unless clearly prohibited by Congressional statute, should adopt a policy of the "open door." The policy exemplified by the decision below is nothing less than an invitation to a dark tunnel with distant exits leading to a useless destination.

The petition for certiorari should be granted.

Respectfully submitted,

JACK CORINBLIT,
VAUGHAN, BRANBLIN, ROBINSON & ROEMER,
Attorneys for Petitioners.

APPENDIX A.

Home Owners' Loan Act of 1933, as Amended, 12 U.S.C., Section 1464(d)(1).

§1464. Federal Savings and Loan Association.

(a) *Organization authorized.*

In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and homefinancing institutions in the United States.

* * * * *

(d) *Proceedings to enforce compliance with law and regulations; grounds and procedure for appointment of conservators, etc.; powers.*

(1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in paragraph (2) of this subsection, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. It shall by formal reso-

lution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representation in Charge, a conservator or a receiver shall be exclusively as provided in paragraph (*2*) of this subsection. Such association shall have thirty days within which to correct the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. Such hearing shall be in the Federal judicial district of the association unless it consents to another place and shall be conducted by a hearing examiner as is provided by the Administrative Procedure Act. The Board or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have power to issue subpenas and subpenas duces tecum, and shall issue such at the request of any interested party, and the Board or any interested party may apply to the United States district court of the district where such hearing is designated for the enforcement of such subpena or subpena duces tecum and such courts shall have power to order and require compliance therewith. A record shall be made of such hearing and any interested party shall be entitled to a copy of such record to be furnished by the Board at its reasonable cost. After such hearing and adjudication by the Board, appeals shall lie as is provided by the Administrative Procedure Act, and the review by

the court shall be upon the weight of the evidence. Upon the giving of notice of alleged violation of law or regulation as herein provided either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, or by certified mail, to the Federal Home Loan Bank Board, Washington, District of Columbia.

APPENDIX B.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Bernard Reich and Sylvia Reich, depositors and members of Beverly Hills Federal Savings and Loan Association, individually and in behalf of Beverly Hills Federal Savings and Loan Association and the other depositor-members of said Association similarly situated, Plaintiffs and Appellants, vs. Eugene Webb, Jr., Marguerite R. Webb, Southland Mortgage Corporation, Lytton Financial Corporation, Lytton Savings and Loan Association, Bart Lytton, and Beverly Hills Federal Savings and Loan Association, Defendants and Respondents. Civil No. 26555.

Filed Aug. 5, 1963.

Appeal from a judgment of the Superior Court of Los Angeles County. Robert H. Patton, Judge. Affirmed.

Vaughan, Brandlin & Roemer, and Jack Corinblit, for Plaintiffs and Appellants.

Whyte & Schifferman, John Whyte, and Robert P. Schifferman, for Respondents Webb.

Thomas W. Clarke and Glen R. Miller for Respondent Beverly Hills Federal Savings and Loan Association.

The defendant Beverly Hills Federal Savings and Loan Association (hereinafter referred to as Beverly Hills Federal) and the defendants Mr. and Mrs. Webb, husband and wife (referred to as the Webbs), demurred to the first amended complaint. The demurrers were

sustained without leave to amend, and a judgment of dismissal was entered. Plaintiffs appeal from the judgment.

The first purported cause of action alleged in substance, as follows: Beverly Hills Federal was organized about 1936 as a federal savings and loan association under the name of Southland Federal Savings and Loan Association. About April 15, 1957, that name was changed to Beverly Hills Federal. Until early in 1961, defendant Mr. Webb was a director, the president, and the managing officer of Beverly Hills Federal; and defendant Mrs. Webb was also a director and officer thereof; and until said time they dominated and controlled the board of directors. The defendants Webb caused the defendant Southland Mortgage Corporation to be formed, and until early in 1961 substantially all its capital stock was owned by them, and they dominated and controlled the board of directors thereof.

The assets of Beverly Hills Federal are by law owned by the depositor-members in proportion to the amount of each member's deposits from time to time. Plaintiffs Reich are, and have been for several years, depositor-members of Beverly Hills Federal. They bring this action on behalf of Beverly Hills Federal and all of its depositor-members who may wish to join in this action.

A proper business opportunity of Beverly Hills Federal is and has been the related business of making appraisals of property and of servicing loans; and that all the fees, commissions, and profits which are incident to the business of such appraisals and servicing of loans were and are a business opportunity of Beverly Hills Federal and its members.

Plaintiffs allege upon information and belief that Southland Mortgage Corporation was formed by defendants Webb for the purpose of appropriating to that corporation and ultimately to themselves the said business opportunities of Beverly Hills Federal in that the Webbs by their control of Beverly Hills Federal prohibited it from participating in said corporate opportunities; and pursuant to the same scheme caused Southland Mortgage to acquire the business of making all the appraisals and inspections connected with the servicing of loans for Beverly Hills Federal, and as a result thereof Southland Mortgage received all the fees, commissions, and profits to which Beverly Hills Federal was entitled and would have received if it had been permitted to engage in said busines; opportunities.

During the past five years, defendants Southland Mortgage and the Webbs have received fees, commissions, and profits in an amount not yet determined by plaintiffs, but all of said fees, commissions, and profits are rightfully the property of Beverly Hills Federal and its members. All the business, assets, and profits of Southland Mortgage have been the property of Beverly Hills Federal and are held by said defendants Southland and the Webbs as constructive trustees for Beverly Hills Federal.

On August 15, 1961, plaintiffs made a demand upon the board of directors of Beverly Hills Federal to prosecute an action seeking the same relief as that which plaintiffs demand herein. The board failed and refused to take any action thereon. The refusal was because Lytton Financial Corporation is the owner of Southland Mortgage and Lytton Savings and Loan Association and also dominates and controls the board of directors of Beverly Hills Federal.

The second purported cause of action alleged in substance, as follows: Plaintiffs incorporate herein by reference the allegations of the first cause of action. At all times herein mentioned defendant Bart Lytton has been the president and a director of Lytton Financial Corporation (referred to as Lytton Financial) and has dominated and controlled Lytton Financial which is a holding company that holds the operating control of Lytton Savings and Loan Association. Early in 1961 the Webbs caused the assets and capital stock of Southland Mortgage to be sold and transferred to Lytton Financial, and a part of that transaction was the transfer of the control of Beverly Hills Federal and its board of directors from the Webbs to Lytton Financial. The sale and transfer of the control of Beverly Hills Federal took place contemporaneously with the sale of Southland Mortgage and was accomplished in part by the resignation of certain members of the board of directors formerly under the control of the Webbs and the substitution in their places of certain persons (Doe defendants) who are under the control of defendants Bart Lytton and Lytton Financial.

Plaintiffs allege upon information and belief that as a part of the said sale and transfer, the Webbs substituted Bart Lytton and other representatives of Lytton Financial as the proxy agents on proxies therefore given to the Webbs by the members of Beverly Hills Federal.

Lytton Financial paid $1,500,000 to the Webbs in consideration for said sale and transfer.

The right to membership on the board of directors of Beverly Hills Federal and the right to control said association were unlawfully sold by the Webbs, and the

proceeds of the sale are held in constructive trust for said association and its members by the Webbs.

The third purported cause of action alleged in substance, as follows: Plaintiffs incorporate herein by reference the allegations of the first and second causes of action. That after the sale of Southland Mortgage to Lytton Financial and the transfer of control of Beverly Hills Federal to Bart Lytton and Lytton Financial, and commencing about April 11, 1961, and continuing to date, the defendants Lytton and Lytton Financial in an unlawful exercise of control of Beverly Hills Federal caused Beverly Hills Federal to purchase from Lytton Savings certain notes and deeds of trust approximating $15,000,000 in face amount. Plaintiffs allege upon information and belief that by reason thereof the defendants Lytton and Lytton Financial have received profits, fees, and other monetary considerations from Beverly Hills Federal and its members in an amount not yet ascertained. Since early in 1961, Lytton, Lytton Financial, and Lytton Savings have dominated and controlled the board of directors and the business of Beverly Hills Federal. Plaintiffs are unable to protect the interest of Beverly Hills Federal and its members except by commencing this action.

Beverly Hills Federal demurred to the first amended complaint on the grounds (1) that it did not state facts sufficient to constitute a cause of action; (2) that the court did not have jurisdiction over the subject of the action in that the Federal Home Loan Bank Board has promulgated complete rules and regulations for the Federal Savings and Loan System which has exclusive jurisdiction of the control of Beverly Hills Federal, and the plaintiffs have failed to exhaust their

administrative remedies to petition the Home Loan Bank Board for relief as to the purported charges herein; and (3) that the court has no jurisdiction of the person of Beverly Hills Federal in that it has no jurisdiction to make a determination as to the propriety or legality of any conduct of said defendant in its internal management operations under the rules and regulations of the Home Loan Bank Board.

Defendants Mr. and Mrs. Webb demurred on the grounds (1) that the first amended complaint did not state facts sufficient to constitute a cause of action; (2) that the court had no jurisdiction of the subject matter of said causes of action in that the plaintiffs had failed to exhaust administrative remedies available to them; (3) that the portion thereof which seeks to impose a constructive trust on fees, commissions, or profits received by said defendants more than three years before commencing the action is barred by the statute of limitations.

In a minute order the court stated that the demurrers were sustained, without leave to amend, for the reason that exhaustion of the administrative remedies is a jurisdictional prerequisite to resort to the courts in any matter relating to the operation and regulation of any federal savings and loan association; and the authority, as well as the responsibility, for such regulation lies with the Home Loan Bank Board.

It appears from the amended complaint that the controversy pertains to internal affairs of management, organization, and control of Beverly Hills Federal Savings and Loan Association. Some of the allegations indicating such a controversy are to the following ef-

fect: The plaintiffs bring this action on behalf of themselves and Beverly Hills Federal and all of its depositors who may wish to join in this action. The defendants Webb, while they were directors and officers of Beverly Hills Federal and in control of its board of directors, formed Southland Mortgage for the purpose of appropriating to themselves, as principal owners of Southland, business opportunities which belonged to Beverly Hills Federal, namely, opportunities of making appraisals and inspections in connection with the servicing of loans. Said defendants did appropriate to themselves such opportunities and did receive therefrom fees, commissions, and profits which otherwise would have been received by Beverly Hills Federal. The Webbs, by reason of such conduct and their control of Beverly Hills Federal, prohibited Beverly Hills Federal from participating in those opportunities and from receiving such fees, commissions, and profits. In the sale of Southland Mortgage by the Webbs to Lytton Financial, the Webbs unlawfully included in the transaction (1) a transfer of the control of Beverly Hills Federal and the control of its board of directors, and (2) a substitution of B. Lytton and some of his representatives as the proxy agents on proxies which theretofore had been given to the Webbs by members of Beverly Hills Federal. After Lytton Financial obtained control of Beverly Hills Federal under said sale transaction, defendants Lytton Financial and B. Lytton in an unlawful control of Beverly Hills Federal caused it to purchase from Lytton Savings and Loan Association a large amount of notes and trust deeds, and as a result thereof Lytton Financial and B. Lytton have received fees and other monetary considerations.

Beverly Hills Federal is a federal savings and loan association. Such associations are authorized by an act of Congress. (Home Owners' Loan Act of 1933, 12 U.S.C.A., ch. 12, § 1464.) That act authorizes the Federal Home Loan Bank Board to issue charters for such associations. (Ibid.) The Home Loan Bank Board is an independent fiscal agency of the federal government (*Larwood Co. v. San Diego Fed. S. & L. Assn.*, 185 Cal. App. 2d 450, 452 [8 Cal. Rptr. 362]) and is authorized to prescribe rules and regulations for the "organization, incorporation, examination, operation and regulation" of federal savings and loan associations. Such rules and regulations are in the Code of Federal Regulations, title 12, chapter V, subchapter C, sections 541 to 555.11 inclusive.

As stated in *Larwood Co. v. San Diego Fed. S. & L. Assn., supra*, page 452, the "Board has provided extensively detailed rules for the government of each and every act of the internal affairs of associations and under the law fully adequate powers are granted to Board for the enforcement of its orders, including even the right to take over exclusive management of the association for failure or refusal to obey the Board's orders. (*Fahey v. Mallonee*, 332 U.S. 245 [67 S. Ct. 1552, 91 L. Ed. 2030].)" It was stated further therein at pages 452 and 453: "The rules of Board for control of the association provide a complete system of specific procedure by which any person aggrieved by actions relating to the internal affairs of an association may file a petition with Board to be heard and have his grievance acted upon, accompanied by compulsive orders to the association involved. . . ." Judicial notice is taken of the sales of the Board. (*Larwood Co. v. San Diego Fed. S. & L. Assn., supra*, p. 453.)

In *Woodward v. Broadway Fed. S. & L. Assn.*, 111 Cal. App. 2d 218 [244 P. 2d 467], wherein plaintiff sought a determination of the validity of an election of directors of a federal savings and loan association, it was held that plaintiff was required to exhaust his administrative remedy. It was said therein at pages 220 and 221: "Where an administrative remedy is provided by statute, relief must be sought from the administrative body, and this remedy must be exhausted before the courts will act. [Citation.] Exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts. [Citation.] The doctrine of exhaustion of administrative remedies applies where a statute provides an administrative remedy, even though the terms of the statute do not make the exhaustion of the remedy of a condition of the right to resort to the courts. [Citation.] The doctrine, whenever applicable, requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. [Citation.] '[I]t lies within the power of the administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction. [Citation.].'" It was also said in that case (p. 223): The rules and regulations of the Board "are comprehensive, explicit, and govern the operation of federal saings and loan associations from their inception to their dissolution. They have the force and effect of law and are binding on an association, its board of directors, and its members."

As above indicated, the amended complaint does not pertain to the individual rights or claims of plaintiffs with respect to their deposits; but it pertains to their rights, and the rights of Beverly Hills Federal itself and all of its depositor-members with respect to the manner of servicing loans, the right to receive compensation therefor, the election of directors, and the transfer of proxies to persons other than those designated on the proxies. Those matters relate to the management of the internal affairs of Beverly Hills Federal. Since the rules and regulations of the Home Loan Bank Board contain detailed provisions regarding the government of such internal affairs, the plaintiffs are thereby afforded administrative remedies. It does not appear from the amended complaint that plaintiffs have exhausted such remedies. There is nothing in the record to indicate that they could have amended to include such an allegation.

The court did not err in sustaining the demurrers without leave to amend.

The judgment is affirmed.

Wood, *P. J.*

We concur:

Fourt, *J.*

Lillie, *J.*